A guide to Power of Attorney in Scotland
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Power of Attorney

What is Power of Attorney?

You make decisions every day about your life and your future. Decisions may be about where you are going to live and work, or be about family, money or travel. You make judgements about what is right for you.

Everyone over 16 years old in Scotland is presumed to have the legal capacity to make their own decisions unless they are assessed to have lost that capacity, for example through illness or injury.

A Power of Attorney is a legal document which you can use to give someone else the power to make decisions on your behalf if you become unable to do so yourself, and to support you to make decisions. It is important to set up a Power of Attorney so that if you find yourself in a position where you cannot make decisions for yourself, there is someone who knows what your choices would be.

The person who gives the powers is the Granter, and whoever agrees to act on that person’s behalf is the Attorney.

There are many benefits of establishing Power of Attorney. Having a Power of Attorney allows for peace of mind as you have someone who knows what is important to you, and will help you plan for later life. You know you will have the support of someone you trust. If they need to act on your behalf, your Attorney will have all the information they need to know what your decisions and opinions would be, and can take appropriate action with confidence.
If you do not set up a Power of Attorney and you lose the ability to make decisions for yourself, the person then making decisions on your behalf may not be the person you would have chosen.

Being an individual’s next of kin does not give any right to make decisions if someone loses the capacity to make their own decisions and is not a substitute for Power of Attorney.

If you lose the ability to make decisions yourself and your Attorney needs to step in to make decisions on your behalf, you should still be involved in making decisions as much as possible.

A Power of Attorney document is not a Will, and it does not relate to what happens after you die. After your death your Executor will be responsible for sorting out your estate.
Types of Power of Attorney in Scotland

There are three different types of Power of Attorney in Scotland.

1. Continuing Power of Attorney enables you to appoint someone to look after your property and financial affairs, and could include the powers to manage your bank accounts or sell a house. You can choose whether a Continuing Power of Attorney takes effect straight away (so someone can help you to manage your money) or choose for it to take effect only if you lose the capacity to make your own decisions.

If you want your Attorney to act on your behalf straight away whilst you still have the mental capacity to make your own decisions, their role is to assist you to make and act on your own decisions.

2. Welfare Power of Attorney enables the Attorney to make decisions about your health and welfare, only if you are unable to do this yourself. Welfare powers can include deciding where you will live and choices about medical treatment and care.

3. Combined Continuing and Welfare Power of Attorney enables the Attorney to look after both financial affairs and health and welfare decisions.

You may also set up a Simple Power of Attorney. This is usually created for a set period of time or for a specific issue, for example, if you go abroad and would like someone else to be able to make decisions on your behalf whilst you are away. A Simple Power of Attorney can only be used whilst you have the mental capacity to make your own decisions and it does not need to be registered with the Office of the Public Guardian. Consult a Solicitor for further information about how to set up a Simple Power of Attorney.
The role of the Office of the Public Guardian in Scotland

The Office of the Public Guardian in Scotland is responsible for the registration and maintenance of Power of Attorney documents within Scotland. The Office will ensure that documents are properly registered, offer information and advice to Attorneys dealing with financial affairs and can investigate any complaints raised about the actions taken by an Attorney.

They can deal with issues such as:

Mark is helping his Mother set up Power of Attorney but is unsure how to register the document and how much this will cost.

Sarah is concerned her father’s Attorney has not considered his wishes while making decisions and is unsure who she can discuss this with.

Laura has been advised to set up Power of Attorney for her mother as soon as possible and would like to know if an application can be speeded up and if so, how she would do this.

You can contact them through their website [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk) or call 01324 678 300.
What is mental capacity?

Mental capacity refers to our ability to make decisions for ourselves and act on them. Some people may have had limited capacity all their lives if they have a significant learning disability. Others may have a diminishing capacity caused by a progressive illness such as dementia or someone could suddenly lose capacity after a stroke or an accident. Many people may be mostly managing well but find it hard to make certain decisions or take the necessary action about specific things.

In Scotland, when somebody becomes incapable of managing their finances or making decisions about their welfare, the Adults with Incapacity (Scotland) Act 2000 provides protection for them. The Act states that a person may not have mental capacity if they are unable to:

- Act on or make decisions
- Communicate decisions
- Understand decisions or
- Remember decisions.

People whose rights are protected by the Act include those who cannot communicate (for example because of a stroke or sensory impairment), have a learning disability, mental illness, or dementia.

Mental capacity can change both in the short term and long term, so someone’s ability to make decisions can vary from day to day and year to year. The Act takes this into account. For example, if somebody has been diagnosed with dementia, they are likely to have the ability to make some decisions. The Attorney needs to take into account the person’s present and past feelings and wishes as far as possible.

The Act gives people the opportunity to plan ahead, and make sure that their wishes are known for the future.
What happens if there is no Power of Attorney in place?

Many people think that if they become ill or unable to make decisions for themselves then a family member (such as a partner or adult child) can act on their behalf but this is not the case. If you have not appointed an Attorney another person would, in most cases, have to go to court to get the authority to act on your behalf.

The process of applying to court may take a long time, is expensive and can be a stressful and emotional experience. The person appointed by the court may not be who you would have chosen to make decisions on your behalf and they may struggle to know what your wishes would have been.

Call the Age Scotland helpline on 0800 12 44 222 for information and advice in this situation.

Common problems if there is no Attorney in place

Sarah’s husband has been left unable to speak and is confused following a stroke. They don’t have joint bank accounts, so she can’t access her husband’s money. She is struggling to pay the bills.

Mary feels frustrated that she has been excluded from meetings and decisions about her sister’s health and care. Her sister has been assessed as no longer having mental capacity, and now lives in a care home.

Andrew was diagnosed with dementia one year ago. His memory has become worse and he can no longer make decisions about his finances. His children disagree about who should go to court to act on his behalf. Andrew always knew that he would prefer his son to do this for him (and had let him know this), but he didn’t know he had to officially state it in a Power of Attorney document.
Granting Power of Attorney

Points to consider if you are thinking of granting someone Power of Attorney.

Setting up a Power of Attorney which clearly sets out your wishes should give you peace of mind as your Attorney will know what you want and what matters to you.

A Power of Attorney is important when decisions need to be made about medical treatment. In a medical emergency hospital staff have a duty of care towards you and will try to involve you in making decisions about your treatment. If you do not have an Attorney and cannot express your views this can cause complications. For example it may be a difficult situation where there are options available for medical treatment or care but no one knows what you would have chosen.

It is important to grant Power of Attorney to someone you trust, and you should never feel pressured in your choice. Whilst you can still make decisions for yourself, you can change or cancel the Power of Attorney for any reason.
Writing the Power of Attorney document

With both Continuing and Welfare powers you can make it clear exactly how you would like any decisions to be made if you were unable to do this for yourself. It is important to think of requests which are specific to your circumstances.

For Continuing Powers you may consider

- how your money is managed,
- that any regular payments to subscriptions (for example magazines) are continued,
- make gifts of specified amounts to named people,
- buy and sell investments and other property, including houses,
- permit your Attorney to claim necessary expenses.

If you want your Attorney to have these or other specific powers, you need to make it clear within the Power of Attorney document.

For Welfare Powers you may consider

- how you like to dress,
- what you like to eat,
- where you would like to live,
- what would happen to any pets you may have,
- who you see,
- what activities you may wish to participate in

It is important to have conversations with your Attorney to ensure they understand your requests, and how your wishes can be carried out. You may wish to have regular conversations with your Attorney so they understand exactly how you make decisions to allow them to support you should you lose capacity. This will avoid the need for them to make decisions based on what they think you would have wanted, which may not be what you would have preferred.
Who can be appointed as your Attorney?

The Attorney could be a partner, husband, wife or civil partner, a solicitor, friend or relative. They have to be over 16 years old, and cannot be bankrupt (or ‘sequestrated’). You can learn more about this on the [Office of the Public Guardian website](http://www.publicguardian-scotland.gov.uk/power-of-attorney/faqs). Whoever you choose, you need to be confident that they would act reliably on your behalf and that they have the skills to carry out the responsibilities you have given them.

**Joint Attorneys**

You can give more than one person the authority to make decisions about your life. There are two different options available to you.

1. You can choose to involve more than one person to make the same types of decisions about you, for example about your finances. If you choose more than one person, do consider their relationship and whether they would work well together.

2. You can choose separate people to make decisions about your welfare and about your finances. For instance, you may feel that a brother or sister is best suited to managing your finances, and your partner may be better at making decisions about your welfare.

**Substitute Attorneys**

It is a good idea to include someone as a substitute Attorney, who can take on the role if your original Attorney cannot continue or chooses not to continue. This is particularly important if a couple have appointed each other as Attorneys and one dies or becomes incapable of acting as Attorney.
Other options

If you do not have any suitable close relatives or friends who you could trust to act on your behalf, your options are limited. You could appoint a solicitor, but they will charge a fee for acting on your behalf. If you are in this position, call the Age Scotland helpline on 0800 12 44 222 to talk about other options you may have.
How do I set up a Power of Attorney?

There are two different ways you could set up a Power of Attorney agreement. You can do this by using a solicitor or by writing a Power of Attorney document yourself.

**Using a Solicitor**

Most people use a solicitor to draw up a Power of Attorney. The solicitor’s training and expertise should ensure that it is written so that the wishes of the Granter are met and the responsibilities of the Attorney are clearly understood. The solicitor can also help you to think about the types of decision which might need to be made in future.

The solicitor has to confirm that you have the mental capacity to understand what you are doing by granting Power of Attorney. If they agree that you are able to grant Power of Attorney, they will then send the document to the Office of the Public Guardian to be registered.

**GP Charges**

Your solicitor may also request that you visit your GP to make a decision about your mental capacity. If you are writing your own Power of Attorney document you will also need to include confirmation of your mental capacity. Your GP is likely to charge for this service and costs will vary; contact your GP surgery for details of their charges.

To find a solicitor you can contact the [Law Society of Scotland](http://www.lawscot.org.uk), which is the professional body for Scottish solicitors. They regulate and represent all solicitors in Scotland, and can provide details of local solicitors.

Telephone: **0131 226 7411**

[www.lawscot.org.uk](http://www.lawscot.org.uk)
Common problems with Power of Attorney documents:

- Unclear wording within Power of Attorney document: for example, you may think that a power you want to grant is clearly written, but it may be open to interpretation when a decision needs to be made.
- The Attorney has not confirmed in writing that they have agreed to take on this role. The Office of the Public Guardian cannot accept the document if they do not have this agreement.
- If someone tries to register a specific document such as financial (Continuing) Power of Attorney, which also mentions non-financial issues such as welfare issues, this cannot be accepted and would need to be re-written.

Writing a Power of Attorney yourself

If you choose to draw up a Power of Attorney yourself you need to:

- Write the document and set out the powers you want your Attorney to have.
- Include a certificate from a solicitor or a doctor to confirm that you have the capacity to understand the powers you are granting, and to confirm that you have not been pressured or forced into it in any way.
- Ask a solicitor to check the document is clear and correct to avoid potential errors.
- The Power of Attorney document must be registered with the Office of the Public Guardian before it can be used.
Ending a Power of Attorney

A Power of Attorney may be ended by either the Granter or the Attorney at any time.

If the Granter wants to end the Power of Attorney, they need to write to the Office of the Public Guardian to explain this. They need to send a certificate from a solicitor to confirm that they understand the effect of ending the Power of Attorney and have not been pressured into making the decision. Any agency the Attorney has been involved with (such as a bank) will need to be notified too.

If the Attorney wants to end the Power of Attorney, they should contact the Office of the Public Guardian and formally resign.

The role of Attorney ends automatically if:

- The Granter dies. When this happens the Executor appointed in the will has responsibility for decisions instead.
- Either the Granter or the Attorney becomes bankrupt. This affects Continuing Power of Attorney, but a Welfare Power of Attorney can continue.
- A separation or ending of marriage or civil partnership occurs (if either person, or both, had been an Attorney for the other).
A guide to Power of Attorney in Scotland
Being an Attorney

Points to consider if you are thinking of becoming an Attorney

Becoming an Attorney is a big responsibility. It is hard to predict the types of decision you may have to make on somebody else’s behalf, and you need to be sure that you will be able to provide the support that is needed. Managing someone’s finances or welfare can be time consuming and stressful.

Being an Attorney is a responsibility, not a right over someone else’s life. You have a duty of care to carry out the person’s instructions. If you feel that there would be instructions you could not follow you should not accept the position of Attorney. For example you may find it difficult to accept the person’s religious beliefs or disagree with aspects of their life. This could be relevant to both Continuing (financial) and Welfare matters.

Depending the financial position of the person who has granted you Power of Attorney you may have to deal with financial matters such as shares, pensions, trust funds, benefit claims, care home fees, sale of property and tax. For welfare matters, you may need to make life changing decisions about medical treatment or care. You may also need to know where to find advice for yourself to help you with your responsibilities.
Your responsibilities as an Attorney

An Attorney’s responsibilities depend on the type of powers that have been granted. In general terms, the law sets out five key principles which Attorneys must follow:

1. Any decision taken must benefit the person. This might seem obvious, but you may be faced with quite tough decisions and you need to be sure that they all make the person’s life better in some way. You must not take advantage of your position in any way to benefit yourself.

2. The least restrictive option should always be taken. The consequences of a decision should always be considered, and any option taken should preserve the person’s privacy and independence as far as possible.

3. The wishes of the person must be taken into account. You must carry out the person’s instructions, respect confidentiality and keep records of the actions you have taken, so you have evidence of what you did and why in case you need it later. If the person has not given specific instructions (for example, about selling their house) then you should seek legal advice.

4. Other relevant people must be consulted before a decision is made. Acting as Attorney does not mean that your view is the only one that counts. Part of your role is to ask other people who are involved in the person’s life what their view is, and to take this into account. This could be their carer, relatives or others who are close to them.

5. The person must be encouraged to use their own skills and develop new skills where possible. They may be able to make some decisions themselves, and should be consulted as far as possible. If someone cannot make a decision at a particular time, consider whether they are likely to be able to decide later that day or at another time.
**If I agree to be Attorney, what happens next?**

When the Power of Attorney has been registered with the Office of the Public Guardian, they will send you a registered copy of the document. If you need to act as Attorney, you will have to show this to relevant organisations such as banks, a GP, solicitors, or a care provider, together with proof of your identity.

There is generally little supervision of Attorneys unless there is a complaint, or a particular investigation is made. The *Adults with Incapacity (Scotland) Act 2000: Code of Practice for Continuing and Welfare Attorneys*, covers the main responsibilities of Attorneys.

This is available on the website of the **Office of the Public Guardian in Scotland** [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk) or you can call them on **01324 678 300**.
Prices, costs and advice

Prices and help with costs

There is a fee to register a Power of Attorney with the Office of the Public Guardian. Some people including those receiving Pension Credit Guarantee can be entitled to a fee exemption.

For current fees, contact the Office of the Public Guardian in Scotland: www.publicguardian-scotland.gov.uk /01324 678 300.

Depending on your income and savings you may be entitled to some help towards the legal fees for a solicitor to draw up a Power of Attorney if you use a legal aid solicitor. This may be a solicitor working in private practice, a law centre or other advice agency, or in one of the Scottish Legal Aid Board’s Civil Legal Assistance Offices.

The Scottish Legal Aid Board does not give legal advice but they do have a Legal Aid information line for general enquiries. They can also give information about where to find a legal aid solicitor in your area. You can reach them on 0845 122 8686 or visit their website at www.slab.org.uk. They also have a leaflet called Civil legal aid - information for applicants, which is available in paper form and online.

If you would like to grant Power of Attorney to a solicitor they will charge a fee for their work. For example, if a solicitor deals with a property or legal matter for you on your behalf, they would charge for their time to carry this out.

While friends and family will probably not charge fees, they might need professional help to deal with complicated issues.

Attorneys can be entitled to money back for costs directly related to their duty as Attorney. However, this is only possible if the Granter gives them this power in the Power of Attorney document.
Where can I go for advice?

Age Scotland helpline 0800 12 44 222

The Age Scotland helpline provides information, friendship and advice to older people, their relatives and carers.

If you need an interpreter call 0800 12 44 222 and simply state the language you need e.g. Polish or Urdu. Stay on the line for a few minutes and the Age Scotland helpline will do the rest.

Call us on 0800 12 44 222 for a copy of our publications list or download copies from our website at www.agescotland.org.uk.

The Office of the Public Guardian (Scotland)

The Office of the Public Guardian in Scotland has a general function to supervise people who have been appointed to manage the financial or property affairs of adults who lack the capacity to do so for themselves. Every Continuing and Welfare Power of Attorney document has to be registered with them.

Telephone: 01324 678 300
www.publicguardian-scotland.gov.uk

Your local Citizens Advice Bureau

Your local Citizens Advice Bureau provides independent information and advice. If you are an Attorney, and want to speak to someone face to face about a particular part of your role (such as benefit application forms), your local CAB is a good source of advice.

You can find your nearest CAB by calling Citizens Advice Direct on 0808 800 9060 or visit the Citizens Advice Scotland website www.cas.org.uk.
Law Society of Scotland

The Law Society of Scotland is the professional body for Scottish solicitors. They regulate and represent all solicitors in Scotland, and can provide details of local solicitors.

Telephone: 0131 226 7411
www.lawscot.org.uk

Mental Welfare Commission for Scotland

The Commission aims to ensure that care, treatment and support are lawful, and promote the welfare and rights of individuals with mental illness, learning disabilities and related conditions.

Free advice line: 0800 389 6809
www.mwcscot.org.uk

Money Advice Service

The Money Advice Service provides free and impartial advice to help people manage their money. If you are a financial (Continuing) Attorney, you can phone them on the Granter’s behalf.

Telephone: 0800 138 7777
www.moneyadviceservice.org.uk

Scottish Legal Aid Board

The Scottish Legal Aid Board is responsible for managing legal aid in Scotland. Advice and assistance is part of this, and it is worthwhile getting in touch to see if you qualify for help towards the legal fees for a solicitor to draw up a Power of Attorney.

Telephone: 0845 122 8686
www.slab.org.uk
Where to find out more

You can find guidance about the more technical aspects of Power of Attorney:

**The Code of Practice for Welfare and Continuing Attorneys** is available on the website of the Office of the public Guardian in Scotland [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk). Annex 1 of this publication is a useful guide to communicating with people who have impaired capacity.

**The Adults with Incapacity (Scotland) Act 2000**

The Act can be found at [www.legislation.gov.uk](http://www.legislation.gov.uk).

A booklet is also available called *Adults with Incapacity (Scotland) Act 2000: A short guide to the Act*, which covers all the key points in general terms.

Disclaimer

While we aim to ensure that the information in this document is factually correct at the time of production, Age Scotland cannot be held liable for any errors or omissions. Please ensure that you have an up to date factsheet and that it clearly applies to your situation.

No factsheet can ever be a complete guide to the law, which changes from time to time. Legal advice should always be taken if you are in doubt. Please note that the inclusion of named agencies, companies, products, services or publications in this factsheet does not constitute a recommendation or endorsement by Age Scotland.

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